# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 25, 2010 |
| v | No. 291019<br>Wayne Circuit Court |
| TONY EDWARD WALLS,<br><br>Defendant-Appellant. | LC No. 08-015431-FH |

Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 3 to 20 years for the cocaine conviction and one to five years for the felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Because defendant failed to establish plain error regarding his sentencing credit and was not denied the effective assistance of counsel, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court erred by declining to award him credit for time served because he was on federal supervised release at the time he committed the instant offenses. Because defendant did not request credit for time served at sentencing, or object to the presentence recommendation that he was not entitled to credit for time served because he was on federal supervised release, this issue is not preserved. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). We review unpreserved claims of sentencing error for plain error affecting defendant's substantial rights. *People v Callon*, 256 Mich App 312, 332; 662 NW2d 501 (2003).

"Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing." MCL 769.11b. This statute "provides that if a sentencing court has before it a convict who has served time in jail before sentencing because he or she could not afford or was denied bond, the court must credit that person with time served." *People v Stead*, 270 Mich App 550, 551; 716 NW2d 324 (2006).

The law is clear that where a defendant is held in jail because the charged offense constituted a violation of parole, he is not entitled to credit for time served. *People v Idziak*, 484 Mich 549, 562-563; 773 NW2d 616 (2009).

Defendant asserts that federal supervised release is not the same as parole and is more akin to probation. However, while a defendant is entitled to credit for time served in jail as part of probationary sentence after probation is revoked, *People v Sturdivant*, 412 Mich 92, 97-98; 312 NW2d 622 (1981), the credit is applied against the sentence imposed on the conviction for which the defendant was initially sentenced to probation, not against a sentence imposed on another offense.

Further, defendant's reliance on *People v Shaw*, unpublished opinion per curiam of the Court of Appeals, issued July 2, 1999 (Docket No. 210717), slip op at 4-5, is misplaced. Although this Court decided in *Shaw* that the defendant was entitled to credit for time served where he committed a crime while on federal supervised release, this Court relied primarily upon *People v Johnson*, 205 Mich App 144; 517 NW2d 273 (1994) in reaching that conclusion. *Johnson* held that a defendant is entitled to credit for time served while being held for an offense committed while on parole from a foreign jurisdiction. *Id.* at 146-147. A special conflict panel subsequently determined "that *Johnson* was wrongly decided" and that a defendant is not entitled to sentence credit in that situation. *People v Seiders*, 262 Mich App 702, 703, 705; 686 NW2d 821 (2004). Accord *Meshell*, 265 Mich App at 640. Thus, apart from the fact that *Shaw* is not precedentially binding, MCR 7.215(C)(1), its legal underpinning has been rejected. Accordingly, defendant has failed to establish plain error.

Defendant next argues that he was denied his right to the effective assistance of counsel because defense counsel did not call him to testify in his own behalf. Because defendant did not raise this issue in a motion for a new trial or request for an evidentiary hearing below, our review is limited to errors apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish a claim of ineffective assistance of counsel,

> defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. [*People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).]

A criminal defendant has a constitutional right to testify. *People v Simmons*, 140 Mich App 681, 683-684; 364 NW2d 783 (1985). While the decision whether to call a defendant to testify is generally a matter of trial strategy, *People v Alderete*, 132 Mich App 351, 360; 347 NW2d 229 (1984), the defendant retains the ultimate authority to decide whether to testify. *Jones v Barnes*, 463 US 745, 751; 103 S Ct 3308; 77 L Ed 2d 987 (1983). Thus, the defendant has the right to testify even if counsel disagrees with that decision. *Simmons*, 140 Mich App at 685. On the other hand, counsel cannot force the defendant to testify if he does not want to because the defendant cannot be compelled to be a witness against himself. US Const, Am V; Const 1963, art 1, § 17.

The record shows that the trial court advised defendant of his right to testify or to not testify, and informed him that the decision was "one that you have to make. . . . [I]t's not a decision that [defense counsel] can make on your behalf. . . . She can give you her advice, give you her opinion . . . . But you are the one who has to make the ultimate decision as to whether or not you want to testify, whether or not it agrees or disagrees with your attorney." The court then took a recess to allow defendant to confer with defense counsel, following which defendant advised the court that he did not want to testify. Because there is nothing in the record to show that counsel did not advise defendant of the repercussions of his decision not to testify or that her advice was unsound or erroneous, defendant has failed to show that counsel was ineffective. *Alderete*, 132 Mich App at 360.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto